No. 98-1887

Supreme Court, U.S.
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In The

Supreme Court of the United States

NORTH CAROLINA RIGHT TO LIFE, INCORPORATED; NORTH CAROLINA RIGHT TO LIFE POLITICAL ACTION COMMITTEE; BARBARA HOLT, President of North Carolina Right to Life, Incorporated,

Petitioners,

v.

GARY O. BARTLETT, in his official capacity as Executive Secretary-Director of the State Board of Elections of the State of North Carolina; STEVE A. BALOG, in his official capacity as District Attorney for North Carolina Prosecutorial District 15A, and as a representative of the class of District Attorneys in the State of North Carolina; MIKE EASLEY, in his official capacity as Attorney General for the state of North Carolina; JUNE K. YOUNGBLOOD, in her official capacity as a Member of the State Board of Elections; DOROTHY PRESSER, in her official capacity as a Member of the State Board of Elections; LARRY LEAKE, in his official capacity as Chairman of the State Board of Elections; S. KATHERINE BURNETTE, in her official capacity as Secretary of the State Board of Elections; FAIGER M. BLACKWELL, in his official capacity as a Member of the State Board of Elections,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

James Bopp, Jr.
Counsel of Record
Heidi K. Meyer
Bopp, Coleson & Bostrom
1 South 6th Street
Terre Haute, Indiana 47807-3510
(812) 232-2434

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. North Carolina's Brief In Opposition Confirms That Prohibiting Contributions Based Upon Source Is A Widespread Problem That Requires Addressing By This Court.

North Carolina's Brief In Opposition provides evidence of twenty other states that have banned contributions based upon an individual's profession as a lobbyist. North Carolina claims that this fact "demonstrates the widespread belief" that the avoidance of actual or apparent corruption "demands" a ban on lobbyists' contributions. Brief of Respondents at 26.

To the contrary, the fact that twenty-one states have banned lobbyist contributions in some form shows only the widespread regulation of contributions based upon source. Lobbyists are not the first profession to be prohibited from contributing to candidates and will certainly not be the last.[1] Without guidance from this Court as to the proper analysis, the upholding of lobbyist contribution bans will create a domino effect, with the result that large numbers of professions, and individuals within those professions, will be prohibited from exercising their

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[1] Efforts have been made to ban contributions from individuals within the gambling and casino industry, *Brown v. State*, 680 So.2d 1179 (La. 1996); *Soto v. State*, 565 A.2d 1088 (N.J.Super.Ct.App.Div. 1989), *cert. denied*, 496 U.S. 937 (1990); the securities profession, *Blount v. Securities and Exchange Commission*, 61 F.3d 938 (D.C. Cir.), *cert. denied*, 517 U.S. 1119 (1995); the insurance profession, *Gwinn v. State Ethics Commission*, 426 S.E.2d 890 (Ga. 1993); the liquor industry, *Schiller Park Colonial Inn, Inc. v. Berz*, 349 N.E.2d 61 (Ill. 1976); and the police, *Reeder v. Kansas City Board of Police Commissioners*, 733 F.2d 543 (8th Cir.), *cert. denied*, 479 U.S. 1065 (1984).

First Amendment rights merely because they have a certain job.

Furthermore, just because such prohibitions are "widespread" does not make them reasonable. The reasonableness of the belief must be examined.[2] Restrictions on speech cannot be based upon misperceptions, no matter how widely held.[3] However, North Carolina admits that it cannot justify the prohibition with examples of corruption within its own boundaries, *id.* at 16, and offers no other evidential support.

Moreover, the State's argument that if North Carolina's statute is found infirm, the "statutes of [ ] twenty-one states may be in constitutional jeopardy," is easily dismissed. Brief of Respondents at 26. This Court has not shied away from declaring a statute unconstitutional because of the potential effects of its decision on other state laws. For instance, the result of this Court's decision in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), striking down a congressional term limits law, was to invalidate laws adopted in twenty-one other states. *See* Cleta Mitchell, *Setting Limits* at 94 (1996).

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[2] Men used to fear "witches and burnt women" but that does not mean that their fear was reasonable. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

[3] Without evidentiary support, there is "no way to challenge the 'appearance of corruption' – others' subjective perception that corruption does exist – other than to make the case that their perceptions are wrong." Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L.J. 1049, 1067 n.113 (1996).

II. The Relatedness Of This Case To *Nixon v. Shrink Missouri Government PAC* Makes It A Natural Companion, Yet Its Differences Also Require This Court To Review It.

This case raises several of the same issues as *Nixon v. Shrink Missouri Government PAC*, 161 F.3d 519 (8th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (1999): namely, what standard of scrutiny the State must satisfy, and the evidence required before First Amendment rights may be restrained. Yet, this case is importantly different from *ShrinkPAC* in that it is a prohibited source case, rather than a contribution limits case. Not only is the overall analysis different, *see* Petition for Writ of Certiorari at 5-8, but it raises important issues in the tradition of previous prohibited source cases. *See Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1995) (whether law could limit independent expenditures by political action committees); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (whether business corporations could be prohibited from using corporate treasury funds for independent expenditures); *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (whether independent expenditures by business corporations could be prohibited); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) (whether corporations could be prohibited from making corporate expenditures regarding state referendums); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (whether federal employees could be prohibited from certain political activities).

III. The Court Of Appeals Erred In Holding That North Carolina's Prohibition On Campaign Contributions By Lobbyists And Their Employers While The Legislature Is In Session Furthers A Compelling State Interest.

(A). The State admits that there is nothing inherently corrupting about lobbyists.

North Carolina admits that there is nothing inherently corrupting about lobbyists. Brief of Respondents at 9. Thus, the State has admitted that lobbyists are *not* like certain sources identified by this Court as posing such an inherent risk of corrupting the political process that they could be totally barred from political participation. *See Austin*, 494 U.S. 652 (upholding prohibition on business corporations from using corporate treasury funds for independent expenditures); *National Ass'n of Letter Carriers*, 413 U.S. 548 (upholding Hatch Act provision which prohibits federal employees from certain political activities); *cf. National Conservative Political Action Comm.*, 470 U.S. 480 (striking down federal law limiting independent expenditures by political action committees); *Massachusetts Citizens for Life*, 479 U.S. 238 (holding that prohibition on independent expenditures by business corporations could not constitutionally be applied to not-for-profit ideological membership corporations); *Bellotti*, 435 U.S. 765 (striking down a prohibition on corporate expenditures regarding state referendums).

As previously explained, *see* Petition for Writ of Certiorari at 5-8, prohibited source analysis focuses on whether a particular group's participation in the political process is inherently corrupting. The State agrees that participation by lobbyists is not inherently corrupting,

and the Fourth Circuit made no finding that North Carolina lobbyists had an inherent and unique ability to corrupt legislators. Therefore, the Fourth Circuit erred in determining that lobbyists may be regulated as a prohibited source and thus unconstitutionally denied lobbyists the right to make contributions to candidates during the legislative session. *See Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 119 S. Ct. 1923, 1935 (1999) ("Even under the degree of scrutiny that we have applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment.") (*comparing Carey v. Brown*, 447 U.S. 455, 465 (1980); *Bellotti*, 435 U.S. at 777, 784-85)).

(B). North Carolina prohibits lobbyists' contributions based only upon the proximity to legislators and lobbyists' "potentially great financial resources."

North Carolina argues that its ban on lobbyists' contributions is justified because of their "proximity to legislators and the legislative process." Brief of Respondents at 10. According to the Respondents, this proximity, "when coupled with potentially great financial resources, has the potential to undermine public confidence in the legislative process." *Id.*

That lobbyists may have "great financial resources" is irrelevant. North Carolina's individual contribution limit of $4,000 applies equally to everyone regardless of their supposed wealth. Therefore, individual lobbyists cannot use "potentially great financial resources" to make unlimited contributions.

(C). North Carolina now claims that contributions by lobbyists may be prohibited because they "create[ ] the appearance of impropriety."

North Carolina now suggests that it may restrict the contribution rights of lobbyists because "at the very least, it creates the appearance of impropriety." Brief of Respondents at 25. However, not only has the "appearance of impropriety" interest never been found to be compelling, but in other contexts it has been found too vague, dangerous and imprecise, *see* Kramer, *The Appearance of Impropriety Under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers*, 65 Minn. L. Rev. 243, 265 (1980) ("simply too dangerous and vague"); *Gregori v. Bank of America*, 254 Cal.Rptr. 853, 862 (Cal.App.Ct. 1989) ("too imprecise to furnish a reliable judicial guideline"), and one court found that "there must be at least a *reasonable* possibility that some specifically identifiable impropriety *did in fact occur.*" *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976) (emphasis added).

(D). No deference to North Carolina is required.

The State also argues that deference to the judgment of the legislators is due because "[n]o one is in a better position than the legislators themselves to decide what conduct by legislators and those around them might be or appear to be corrupting." Brief of Respondents at 18. However, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). "Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a

check on legislative power would be nullified." *Id.* at 844; *see also Pennekamp v. Florida*, 328 U.S. 331, 335 (1946) (Court must determine if legislation violates First Amendment rather than leaving that determination to the legislature). Therefore, because North Carolina offered no evidentiary support for its infringement of First Amendment rights, the Court need not, and indeed cannot, defer to the legislature's enactment.

(E). A "common sense analysis informed by widely reported legislative behavior from other states" provides no basis upon which to infringe First Amendment rights.

North Carolina also asserts that the Fourth Circuit used a "common sense analysis informed by widely reported legislative behavior from other states" in upholding the statute at issue. However, common sense rationale is not permitted where there is no evidentiary support that the statute advances the State's interest. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) (finding the State's prohibition on liquor price advertising unconstitutionally restricted free speech even though the advertising would, based on common sense, prevent price competition and reduce consumption); *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (in absence of evidence in the record, Court refused to support common sense belief that burning flag could potentially incite others to disturb the peace). At the very least, common sense should not be allowed to support the infringement of cherished and protected free speech rights without evidentiary support in the record.

IV. The Fourth Circuit Erred In Finding That N.C. Gen. Stat. § 163-278.13B Is Narrowly Tailored.

The Respondents also ignore the Petitioners' argument that in the free speech area, broad prophylactic rules are suspect, and precision of regulation must be the goal when the government regulates in this area. *See In re Primus*, 436 U.S. 412, 437-38 (1978); *NAACP v. Button*, 371 U.S. 415, 438 (1963).[4]

In discussing the narrow tailoring requirement within the commercial speech context, this Court has recently stated that "the challenged regulation should indicate that its proponent " 'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition." " *Greater New Orleans Broadcasting Ass'n*, 119 S. Ct. at 1932 (citations omitted).

Respondents argue, however, that *Buckley v. Valeo*, 424 U.S. 1, supports their argument that the Fourth Circuit properly did not distinguish between large and small contributions from lobbyists. Brief of Respondents at 13. In so doing, the Respondents again conflate contribution limit analysis with prohibited source analysis.

The *Buckley* Court was not confronted with a *complete* prohibition on contributions, as in the instant case, but rather, with a *ceiling* on the amount that individuals could contribute. Therefore, the one year "temporal limitation" on contribution limits in *Buckley* has no application to this case. *See State of Florida v. Dodd*, 561 So.2d 263, 266 (Fla.

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[4] Rather than addressing this argument, the Respondents simply state that these two cases do not conflict with the Fourth Circuit's holding because "North Carolina has not sanctioned any lobbyist or organization for representing or purporting to represent the interests of anyone." Brief of Respondents at 13-14.

1990) ("The statute at issue here prohibits all contributions and solicitations. . . . As a result, the present case is vastly different from *Buckley*.").

Furthermore, the Fourth Circuit made no finding that North Carolina calculated the burdens on the speech of challengers in applying the statute to them as well. No showing has been made as to how the purpose of the statute, preventing corruption during the legislative session, is furthered by prohibiting contributions to challengers who can offer no quid pro quo at that time.

Buckley's application of contribution limitations to incumbents and challengers offers no support for the prohibition in the instant case. *Buckley* was concerned with preventing quid pro quo in the future, 424 U.S. at 33, rather than during the legislative session. Hence, both incumbents and challengers could deliver.

In this case, the Fourth Circuit found the statute narrowly tailored precisely because it "last[ed] only during the legislative session" when "the risk of an actual quid pro quo or the appearance of one runs the highest." App. 20. However, challengers cannot deliver during the legislative session when the risk is the highest. Therefore, the Fourth Circuit erred in finding N.C. Gen. Stat. § 163-278.13B was not overbroad.

Furthermore, the Respondents simply state, without proving, that if this Court were to accept the Petitioners' arguments, "the principles undergirding this Court's approval of limitations on the amount of contributions will be undermined." Brief of Respondents at 26-27. As previously shown, this case is not about limiting the *amount* of contributions; rather, it is about the government *prohibiting* participation by a certain group in the

electoral process. Therefore, limits on the *amount* of contributions remain unaffected.

Finally, it does not follow that simply because a State may constitutionally impose ceilings on contributions, it may also validly limit when contributions are made. *See* Brief of Respondents at 24. A temporal "limit" is not really a limit at all; it is a ban. Essentially, by limiting when contributions may be made, the State is determining when speech is permitted and prohibited. *Buckley* does not stand for this proposition. *Buckley* does not regulate when an individual may make a contribution, but leaves the determination of when speech will be most effective to the individual. It is true that once an individual reaches the ceiling he or she may not contribute again until January 1; however, the individual is free to determine if, and when, the ceiling will be reached.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

JAMES BOPP, JR.
Counsel of Record
HEIDI K. MEYER
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807
(812) 232-2434
Counsel for Petitioners

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